in law be validly delegated for purpose of investigation. Investigation of those seven charges by the captain is, therefore, bad.

The next question is: Since there had been no investigation by the commanding officer and no valid investigation by Captain Azman respecting the seven charges, should prohibition lie respecting thereof?

In response to my question on this point, at the initial hearing, though somewhat differently phrased, Encik Abdul Aziz, counsel for the respondents, whilst recognizing the tendency of the courts demonstrating a marked reluctance from seeming to interfere with the proceedings of military authorities, nevertheless, candidly conceded that prohibition ought to lie after making references to ss 95, 96, 97, 98 and 103 of the Armed Forces Act 1972, and rr 52 and 61(1) of the Armed Forces (Court Martial) Rules of Procedure 1976, and the consequences thereof that could have ensued in favour of the applicant such as dismissal of charges, having the charges dealt summarily, the necessity of speedy investigation and want of jurisdiction on the part of the court-martial owing to non-investigation. With that view of counsel, I am inclined to agree.

Also, where part only of a party's request for a prohibition proves to be well founded, and the matter is divisible, the court may grant prohibition in respect of that part: *R* v *Local Government Board*[4] (at p 320).

Having considered all the evidence and all the circumstances of the case as well as submissions by counsel, and, for the reasons given above, I come to the conclusion that prohibition lies and shall be issued respecting the first, third, fifth, seventh, nine, tenth and eleventh charges contained in the charge sheet exh 'MB' annexed to the applicant's affidavit made on 6 November 1986. In relation to the second, fourth, sixth and eighth charges contained in exh 'MB', the relief sought is refused. As to the costs, since both parties partially succeeded in the motion, I order that each party pays its own costs.

Order accordingly.

Solicitors: *Battenberg & Talma.*

Reported by *Ng Sheau Jiuan*

Syarikat Jengka Sdn Bhd v Tri-Trade Properties (M) Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) – CIVIL SUIT NO C3449 OF 1984
ZAKARIA YATIM J
18 JANUARY 1988

Civil Procedure – Striking out statements of defence – Application for – Whether triable issues raised – Letter written by second defendant on instruction of first defendant – Whether letter constituted a letter of undertaking or guarantee

Legal Profession – Letter written by solicitors on instruction of client – Whether letter amounted to a letter of solicitor's undertaking – Triable issue

The plaintiff claimed against the first and second defendants for a certain sum of money in respect of goods sold and delivered by the plaintiff to the first defendant. The plaintiff averred that by a letter of undertaking, the second defendant (the first defendant's solicitors) undertook to pay the plaintiff all outstanding sums in the first defendant's account with the plaintiff up to a certain limit. The second defendant, in its defence, contended that it had signed its name in the said letter of undertaking on behalf of its clients, the first defendant, and that the letter was not a letter of guarantee, indemnity or undertaking.

The senior assistant registrar dismissed the plaintiff's application to strike out the statements of defence of the second defendant on the grounds that there were triable issues of fact. The plaintiff appealed against the decision of the senior assistant registrar.

Held, dismissing the appeal: The letter in question was clearly written by the second defendant as an agent of the first defendant. The undertaking was not given by the solicitor or solicitors personally. Clearly, there are issues to be tried in this case.

Cases referred to

1 *T Damodaran* v *Choe Kuan Him* [1975] 2 MLJ 274 (distd)
2 *United Mining and Finance Corporation, Ltd* v *Becher* [1910] 2 KB 296 (refd)
3 *Seah Choon Chye* v *Saraswathy Devi* [1971] 1 MLJ 112 (refd)

Tan Chuan Yong for the plaintiff.
VK Palasuntharam for Thomas Lee (one of the parties in the second defendant's firm).

Cur Adv Vult

Zakaria Yatim J: This is an appeal against the decision of the senior assistant registrar Mr Wong Teik Meng, given on 15 August 1985, ordering that the application of the plaintiff dated 24 April 1985 for an order that both the statements of defence of the partners of the second defendant (sued as a firm) be struck off and judgment entered against the second defendant be disallowed on the grounds that there are triable issues of fact in this matter.

The plaintiff is a private limited company incorporated in Malaysia with its registered office at no 13A,

Jalan Medan Tuanku, Kuala Lumpur. The first defendant is a private limited company incorporated in Malaysia with its registered office at no 25, SS15/4B, Subang Jaya Industrial Estate, Subang Jaya. The second defendant is a partnership firm of advocates and solicitors with their registered office on the 2nd floor, Wisma MC Choi, no 31B – 282A, Medan Imbi, Kuala Lumpur.

The plaintiff's claim against the defendants is for a sum of $346,500 being the amount outstanding as at 29 February 1984 and owed to the plaintiff in respect of goods sold and delivered to the first defendant at the first defendant's request vide first defendant's account no 4432 with the plaintiff. In its statement of claim the plaintiff averred that it was agreed and accepted by the defendant that interest at 1% per mensen would be charged on all outstanding moneys in the said account. The plaintiff also averred that by a letter of undertaking dated 5 December 1983, the second defendant undertook to pay the plaintiff all outstanding sums in the first defendant's account with the plaintiff up to a maximum of $500,000 and upon the expiry of sixty days after the date of delivery of the said goods. The plaintiff's claim against the second defendant is the said letter of undertaking. According to the plaintiff, the defendants had defaulted in payment and the amount due to the plaintiff was $346,500.

In his statement of defence, Mr Edmund Loo Siew Hoong, a partner in the second defendant firm, averred as follows: He admitted that at all material times he was a partner of the second defendant firm, but he denied that he or his firm was liable to the plaintiff in respect of the plaintiff's claim. He stated that the amount outstanding as at 29 February 1984 and owed to the plaintiff in respect of goods sold and delivered to the first defendant was $346,500 but he denied that he or the second defendant was liable to pay the plaintiff the said amount. Mr Loo admitted that he had signed the second defendant's name in the letter dated 5 December 1983 but he said that he signed the said letter on behalf of the firm's clients, Tri-Trade Properties (M) Sdn Bhd, that is the first defendant. Mr Loo averred that the said letter did not create liability in the second defendant to pay the said sum to the plaintiff. He denied that the said letter was a guarantee, indemnity or undertaking in respect of the first defendant's alleged debt. He said that the second defendant was justified in not making payment to the plaintiff. According to him the first defendant had not placed any moneys with the second defendant or given instructions to remit moneys to the plaintiff.

The defence of Thomas Lee Guan Seong, another partner in the second defendant firm, is substantially the same as that of Edmund Loo. Mr Thomas Lee also stated in his defence that the letter dated 5 December 1983 was not a letter of guarantee, indemnity or undertaking by the second defendant firm and that even if the said letter was a guarantee, indemnity or an undertaking, it did not bind the second defendant.

The basis of the plaintiff's claim against the second defendant is the letter dated 5 December 1983. The text of the letter is reproduced below:

> 5 December 1983
> Encik Abdullah Azizi
> The General Manager
> Syarikat Jengka Sdn Bhd
> 13A, Jalan Medan Tuanku
> Jalan Tuanku Abdul Rahman
> Kuala Lumpur
>
> Dear Sir
>
> Re: Letter of undertaking favouring yourselves (Tri-Trade Properties (M) Sdn Bhd)
>
> We act for Tri-Trade Properties (M) Sdn Bhd who have instructed us to issue this letter of undertaking in connection with their purchase of certain quantities of plywood products which have been negotiated between our clients and yourselves.
>
> We hereby undertake to pay to yourselves a sum not exceeding $500,000 (ringgit five hundred thousand only) on behalf of our clients in respect of the said purchase, such sum being due and payable upon the expiry of 60 (sixty) days after the date of delivery of the said goods.
>
> Yours faithfully
>
> Sgd
>
> cc Tri-Trade Properties (M) Sdn Bhd

According to the plaintiff, the above letter is a letter of undertaking and the plaintiff is entitled to enter judgment against the defendant on the undertaking.

It is to be noted that the letter quoted above expressly states that the second defendant was acting for the first defendant when they wrote the letter. The second defendant wrote the letter on the instruction of the first defendant. The letter does not state that the amount stated therein has been deposited with the second defendant. Indeed, in his statement of defence, Mr Low averred that the first defendant had not placed any moneys with the second defendant.

Counsel for the plaintiff relied on the case, *T Damodaran* v *Choe Kuan Him*.[1] But in that case the money was placed with the solicitor and it was expressly stated in the letter of undertaking. In *United Mining and Finance Corporation Ltd* v *Becher* [2] Hamilton J said:

> Whatever that expression may mean, I think it must at least go as far as this, that when a solicitor, in the course of business which he is conducting for clients with third parties in the way of his profession, gives an undertaking to those third parties incidental to those negotiations, that undertaking is one which is given in his capacity as a solicitor and not as a mere layman undertaking the office of stakeholder or guaranteeing the payment of money. It seems to me that the part which solicitors are nowadays well known to play in

elaborate negotiations, which constantly have to be embodied at various stages in legal forms of a highly technical character, constantly involves for the purpose of facilitating the business the giving of subsidiary undertakings for the payment of money and of a similar character, *and that those undertakings are given in their capacity as solicitors, and money is entrusted to them under those undertakings largely because they are solicitors* and are deemed therefore, and found to be, especially worthy of trust.

(emphasis added)

In that case Hamilton J found, upon the facts and upon the events which had happened, that the money in the respondent's hands was money repayable to the applicants by the terms of the undertaking.

In *Seah Choon Chye* v *Saraswathy Devi*,[3] Syed Agil Barakbah J, as he then was, stated the principle regarding solicitor's undertaking in the following words:

The general principles as regards an undertaking of this nature is that it must be given by a solicitor personally and not merely as an agent on behalf of his client. It must be given in his professional capacity as a solicitor and not as an individual.

Halsbury's Laws of England 3rd Ed at p 195 states the principle in the following words:

Where a solicitor, who is acting professionally for a client, gives his personal undertaking in that character to ... a third ... person that undertaking may be enforced summarily upon application to the court. Before this remedy can be pursued it must be shown that the undertaking is given by the solicitor personally, and not merely as agent on behalf of his client; the undertaking must also be given by the solicitor, not as an individual, but in his professional capacity as a solicitor.

In the instant case, the letter in question was clearly written by the second defendant as an agent of the first defendant. The undertaking was not given by the solicitor or solicitors personally. Furthermore the sum stated in the said letter had not been deposited with the second defendant.

Clearly there are issues to be tried in this case and I agree with the decision of the senior assistant registrar. I therefore dismiss the appeal with costs in any event.

Appeal dismissed.

Solicitors: *Mohd Akhir & Partners*; *VK Palasuntharam*.

Reported by *Ng Sheau Jiuan*

Malayan United Bank Bhd v Mohammed Salleh bin Mohammed Yusoff & Ors

HIGH COURT (KUALA LUMPUR) – SUIT NO C6307 OF 1985
ZAKARIA YATIM J
18 DECEMBER 1987

Civil Procedure – Judgment in default of appearance – Application to set aside – Rate of interest from date of judgment to date of realization stated as 17.75% pa in judgment – Whether rate can be claimed by plaintiff – Statutory limit of 8% pa in O 42 r 12 of the Rules of the High Court 1980 – Effect of – Whether court should correct the judgment or set aside – Rules of the High Court 1980, O 42 r 12

Civil Procedure – Judgment in default of appearance – Application to set aside – Delay in filing application not a primary ground for dismissing application – Existence of a defence on the merits the more important consideration

This was an application by the fourth defendant to set aside a judgment entered in default of appearance against him on 29 November 1985. The fourth defendant/applicant contended that the judgment entered against him was an irregular judgment because the award of 17.75% pa rate of interest from date of judgment till judgment was satisfied exceeded the limit of 8% pa laid down under O 42 r 12 of the Rules of the High Court 1980. The plaintiff/respondent submitted that O 42 r 12 gave the court the discretion to allow interest at the rate of less than 8% pa or more than 8% pa. It also contended that there was inordinate delay on the part of the applicant in filing the application to set aside.

Held, allowing the fourth defendant's application: (1) Section 16(1) of the Courts of Judicature Act 1964 is an enabling provision. It does not confer any power on the High Court regarding interest. It only confers power on the Rules Committee to make rules to regulate the rate of interest payable on all debts. The Rules Committee had already made the rule pursuant to s 16(1) and the rule is contained in O 42 r 12 of the Rules of the High Court 1980. It is clear from the rule that a plaintiff cannot claim, from the date of judgment, that interest rate as agreed upon between the parties if such rate is more than 8% pa.

(2) The amended O 42 r 12, which came into force on 12 December 1986, allowed a plaintiff to claim interest from date of judgment until judgment is satisfied at a rate agreed upon between the parties even though such interest rate is more than 8% pa. However, the amended rule does not apply in the present case as judgment in default of appearance was entered against the applicant on 29 November 1985 when the old r 12 was still in force.

(3) According to the rule in *Armitage* v *Parsons*,[5] if the rate of interest of 17.75% pa had been entered by mistake or if the solicitor's clerk had inadvertently filled the wrong figure and the amount involved was significantly small, the mistake could be corrected and the judgment in default should not be set aside by the court. However, in the instant case, there was no mistake or accidental slip in putting the rate of interest at 17.75% pa and if the rate of interest is calculated on the basis of the principal sum of $3m, the amount would be significantly large. There is therefore no question of the court varying the rate of interest and the applicant has a right ex debito justitiae to have the judgment set aside.